LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 30 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. [redacted] 43

N. L. LINER et al.,
Petitioners,

vs.

JAFCO, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of Tennessee,
Eastern Section.

H. G. B. KING,
KING & FUSTON,
723 Chattanooga Bank Building,
Chattanooga, Tennessee,
Counsel for Petitioners.

KING & FUSTON,
723 Chattanooga Bank Building,
Chattanooga, Tennessee,
S. D. FUSTON,
723 Chattanooga Bank Building,
Chattanooga, Tennessee,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX

	Page
Prayer	1
Opinion Below	1
Jurisdiction	2
Question presented	2
Constitution and Statutory Provisions Involved	2
Statement of the Case	3-5
How Federal Question Is Presented	6-7
Reason for Granting the Writ	7-17
(a) Labor Dispute	9-11
(b) Commerce	11-14
(c) Question of Mootness	14-17
(d) Preemption	17
Conclusion	18
Appendices	19-53

INDEX TO APPENDICES.

Appendix A—Opinion of Tennessee Court of Appeals	19-26
Appendix B—Pertinent Statutory Provisions:	
Taft-Hartley:	
29 U. S. C., Sec. 152 (7) (9)	27
29 U. S. C., Sec. 157	27
29 U. S. C., Sec. 158 (b) (4)	28-29
Tennessee Statutes:	
Sec. 23-1102	29
Sec. 23-1103	29
Sec. 47-1706	30
Sec. 50-208	30
Sec. 50-209	30

Appendix C—Opinion filed Sept. 30, 1960.....31-33
Decree filed March 10, 1961..... 34
Memorandum filed June 2, 1961.....35-39
Final Decree filed June 15, 1961.....39-40
Appendix D—Answer filed Sept. 3, 1960.....40-47
Motion to Dismiss 47-48
Assignment of Errors to Tenn. Court of Appeals..48-53

Table of Cases.

Amalgamated Association v. Wis. Labor Board, 340 U. S. 416 16
Amalgamated Meatcutters v. Fairlawn, 353 U. S. 20.. 11
Am. Fed. of Labor v. Swing, 312 U. S. 321..... 9
Carpenters, etc., 111 N. L. R. B. No. 1025 12
Engineers Assn. v. Interlake Steamship Co., ... U. S. ..., 18 L. Ed. 410 .....7, 8, 11, 17
Ex parte Dilly (Texas), 334 S. W. 2d 425..... 9
Farnsworth & Chambers v. Elec. Wkrs. (Tenn.), 353 U. S. 968, 969, 299 S. W. 2d 8..... 17
Freeman v. Retail Clerks Union (Wash.), July 20, 1961, 363 P. 2d 803 9
Garner v. Teamsters, 346 U. S. 485 17
Gus v. Utah Labor Relations Board, 353 U. S. 23.... 11
Howard v. Haven (Tenn.), 198 Tenn. 572, 281 S. W. 2d 480 10
Kerrigan Iron Works v. Cook Truck Lines (Tenn.), 296 S. W. 2d 1133, 353 U. S. 968, 969 17
Labor Board v. Faiblatt, 306 U. S. 601 11
Lennox-Holdman Co. (NLRB), 127 NLRB No. 49.... 12
Local 74, U. B. ... of Carpenters v. NLRB, 341 U. S. 707 .....16, 17
McAllister Trans. Co. (NLRB), 110 NLRB No. 224.. 12

NLRB v. Denver Bldg. Trades, 341 U. S. 675 11
NLRB v. Greyhound Lines, 303 U. S. 261 15
Piedmont Shirt Co. v. Amal. Clothing Wkrs. (S. C.), 115 S. E. 2d 499 10
Plumbers v. County of Door, 359 U. S. 354 15
Reilly Cardage Co. (NLRB), 110 NLRB No. 233 12
San Diego Bldg. Trades Council v. Gorman, 359 U. S. 236 ..... 7, 17
Siemon's Mailing Service (NLRB), 122 NLRB No. 13 12
Watson v. Wilson (Tenn.), 187 Tenn. 402, 215 S. W. 2d 801 9
Volunteer Elec. Corp. v. Gann (Tenn.), 46 LRRM 3049 17

Statutes.

29 U. S. C., Sec. 1257 (3) 2
29 U. S. C.:
152 (7) 3, 11
152 (9) 3, 9
157 Sec. 7 of Labor Management Relations Act of 1947 as amended 3, 5
158 (b) (4) Sec. 8 of Labor Management Relations Act of 1947 as amended 3, 5, 8
164 Sec. 701 of Labor Management Relations Act of 1947 as amended 11, 12
Tennessee Code Annotated:
Sec. 23-1102 ..... 3, 15
Sec. 23-1103 ..... 3, 15
Sec. 47-1706 ..... 3, 5
Sec. 50-208 ..... 3, 5
Sec. 50-209 ..... 3, 5

Miscellaneous.

Constitution of the United States, Article I, Sec. 8 ... 8
Constitution of the United States, Article VI 2, 8

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. .....

N. L. LINER et al.,
Petitioners,

vs.

JAFCO, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of Tennessee, Eastern Section.

To the Honorable, the Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Tennessee, Eastern Section, entered in the above case on January 12, 1962.

OPINIONS BELOW.

The opinion rendered by the Court of Appeals of Tennessee, Eastern Section, on January 12, 1962, is printed in Appendix A hereto at pages 19-26.

A petition for certiorari to the Supreme Court of Tennessee was denied without opinion by the Supreme Court of Tennessee on September 28, 1962 (R. 346).

JURISDICTION.

The jurisdiction of this Court rests upon 28 U. S. C., Sec. 1257 (3). Petitioners, labor unions and their members, have been enjoined by a state court in Tennessee which lacks jurisdiction inasmuch as the comprehensive Federal Labor Management Relations Act of 1947 has preempted this field of regulation and closed it to parallel state action.

The denial of certiorari by the Supreme Court of Tennessee made effective the decision of the Court of Appeals of Tennessee as the final judgment rendered by the highest court of Tennessee in which a decision could be had.

QUESTION PRESENTED.

Do the Tennessee Courts have jurisdiction to enjoin peaceful picketing by unions, protesting working conditions or work practices of an employer, when the contention is made by the employer that there is no "labor dispute" or "interstate commerce" involved and state laws prevail, but the evidence shows that the dispute and commerce involved were arguably within the meaning of the Labor Management Relations Act and the commerce involved meets the standards set by the National Labor Relations Board, and the matters in dispute had never been presented to the National Labor Relations Board for determination?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provision involved is found in the Constitution of the United States, Article VI, second sentence, as follows:

"This Constitution, and Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

Pertinent statutory provisions which are printed in Appendix B, infra, p. 27 ff., are as follows: Pertinent portions of the Labor Management Relations Act of 1947, viz: 29 U. S. C., Sec. 152 (7) and (9), 61 Stat. 137; 29 U. S. C., Sec. 157, 61 Stat. 140; 29 U. S. C., Sec. 158 (b) (4), 73 Stat. 525, 542, 545; Tennessee Statutes relating to declaratory judgments, Secs. 23-1102, 23-1103; and Tennessee Statutes relating to breach of contracts, Sec. 47-1706, and right-to-work laws, Secs. 50-208 and 50-209.

STATEMENT OF THE CASE.

Petitioners, Chattanooga Building Trades Council AFL, Local 846 of the Hod-Carriers, Building and Common Laborers Union of America, and its International, Hod-Carriers, Building and Common Laborers Union of America are labor organizations and their individual officers and members affiliated with the AFL-CIO. Respondent, Jafco, Inc., is a company engaged in building a large shopping center within the City of Cleveland, Tennessee. Respondent Rea Construction Company, the prime contractor, is a corporation engaged in general building contractual work in several states. Substantial interstate shipments of materials purchased outside the state of Tennessee were required for this project. Rea Construction Company was a non-retail employer who had an annual inflow and outflow of goods and services from or to persons outside the state several times over the jurisdictional yardstick of $50,000.00 as set by the National

Labor Relations Board. The question of interstate commerce is hereinafter discussed on pages 11-14. The complaint alleged that the respondents were building a shopping center to cost in the neighborhood of two million dollars and when completed there would be many tenants (R. 1). Respondents and petitioners became embroiled in a labor dispute by reason of the following facts:

The stockholders of the Rea Construction Company also own, or have substantial interests in another construction company, J. H. Jones Construction Company, and both of these companies have home offices located in Charlotte, North Carolina. Petitioners introduced testimony to show that the respondent, Rea Construction Company, operates under the lowest possible working conditions while its sister-corporation, Jones Construction Company, works under union contracts, pays the prevailing wage scales, and otherwise complies with area working conditions (R. 175, 228-230).

It was argued to the Court that the purpose of having two separate companies operating as aforesaid was to circumvent the NLRA by having the Jones Construction Company to work in areas where there was at least some union support and the courts would permit informational picketing of a company like Rea Construction Company. On the other hand, the Rea Construction Company worked in areas wherein it could underbid competitors due to its lower wage scales and working conditions and where the company hoped to obtain a state court injunction against all picketing (R. 208).

Soon after the construction work began one of the Chattanooga Hod-Carriers' business representatives stopped at the job site and the colored laborers explained the low rate of pay they were receiving and asked their union representative if something could be done (R. 161). The

Chattanooga Building Trades had already considered the placing of a picket at the job site (R. 175).

On August 8, 1960, respondent N. L. Liner, a member of the local Hod-Carriers' Union appeared on the scene of the construction with a picket sign which stated as follows:

> "Rea Construction Company not under contract with Chattanooga Building Trades Council, AFL" (R. 2, 80).

There was no complaint that the picket banner misstated the facts or was misleading. There was no complaint of violence, mass picketing or such. The respondents concluded from mere picketing that the purpose of the picketing was to force a breach of the contracts between the respondents and their subcontractors which would be unlawful under Tennessee laws.

The bill of complaint alleged that petitioners were engaged in unlawful conduct in attempting to cause breaches of contracts which would be unlawful under the Tennessee Code Annotated, Sections 47-1706, 50-208 and 50-209, Appendix B, pages 29-30 (R. 13-21). Within a matter of minutes petitioners were stopped from peaceful picketing by an ex parte injunction issued by a state court.

It was the contention of the petitioners that they had the right to establish a single picket to advertise the truth and permit the public in Cleveland and vicinity to know of the dispute. The position of the petitioners was and is that the picketing was protected under Section 7 of the Act, but assuming that respondents' contention was true, the activity was clearly covered by Section 8 (b) (4) (i) (ii) of the Act. In either event a controversy was presented that could be resolved only by the National Labor Relations Board.

HOW FEDERAL QUESTION IS PRESENTED.

Petitioners filed an answer denying the jurisdiction of the Chancery Court, reprinted at Appendix D, pages 40-47, alleging that the subject matter of the suit was governed by the federal statutes cited herein, that the National Labor Relations Board had exclusive jurisdiction and the state court had no jurisdiction of the subject matter (R. 29-35). A motion to dissolve the injunction and dismiss the bill of complaint for lack of jurisdiction was filed (R. 28), and upon the hearing of the motion the temporary injunction was continued to the final hearing, Appendix C, pages 31-33 (R. 38-41). The case was thereupon heard on the entire record, including the motion to dismiss for want of jurisdiction. The temporary injunction was made permanent which specifically enjoined and restrained petitioners and all their pickets, strikers and sympathizers from picketing the aforesaid job site in any manner and in any manner interfering with performance of said job (R. 247-252). The final Memorandum and Order of the Trial Court are reprinted at Appendix C, pages 35-39.

The petitioners thereafter appealed to the Court of Appeals of Tennessee, Eastern Section, at Knoxville, Tennessee, asserting, among other things (R. 258-288), that the Chancery Court had no jurisdiction of the subject matter of the suit and that exclusive jurisdiction was in the federal agency. The Assignment of Errors and questions presented to the Court of Appeals are reprinted at Appendix D, pages 48-53 (R. 263-267). The Court of Appeals upheld and affirmed the decree of the Trial Court, holding that only intrastate commerce was involved, that there was no labor dispute, and that petitioners had violated state laws. The Court of Appeals, as well as the Trial Court, did not cite or refer to any federal laws or decisions which were controlling.

The Court of Appeals, in its decision, quoted verbatim the decision of the Trial Court in which the following statement was made:

> "Defendants' principal contention involves the question of the Court's jurisdiction. Their able solicitors argued that the National Labor Relations Board has sole and exclusive jurisdiction because interstate commerce is involved here.
>
> "The Court is of opinion and therefore finds that the erection of a shopping center does not involve interstate commerce. It is a localized action and by no definition of the term can it be said that this operation amounts to interstate commerce. But, if it did, there was no labor dispute." Appendix A, page 22.

The federal questions, having been completely ignored by the Trial Court and the Court of Appeals, were next presented to the Supreme Court of Tennessee by timely petition for writ of certiorari (R. 316), which contained assignment of errors challenging the jurisdiction and power of the state courts and specifically presented the following question:

> "Do the state courts have jurisdiction of a case wherein the conduct of which complaint is made arguably should be before the National Labor Relations Board?"

As above indicated, the Supreme Court of Tennessee, on the 28th day of September, 1962, denied the petition without opinion (R. 346).

REASONS FOR GRANTING THE WRIT.

The judgment below is in direct conflict with this Court's Opinions in the cases of **San Diego Building Trades Council v. Gorman, 359 U. S. 236,** and **Engineers Ass'n v. Interlake Steamship Company, ... U. S. ..., 8 L. Ed. 410.**

The Tennessee courts have encroached upon the exclusive jurisdiction of the National Labor Relations Board and the judgment is in direct conflict with and in deprivation of rights guaranteed by the Labor Management Relations Act of 1947 as well as the Constitution of the United States. The Tennessee courts hold that it is for the state courts to decide whether or not there is a "labor dispute" and whether "interstate commerce" is involved and then decides each issue contrary to controlling law.

The action of the Tennessee courts is in direct conflict with this Court's Opinion in the **Engineers Ass'n v. Interlake Steamship Co.**, supra, wherein it was held:

> "The task of determining words defined by the Labor Management Relations Act must in any doubtful cases begin with the National Labor Relations Board whenever a reasonably arguable case is made to that effect."

As was pointed out in the appeal to the Tennessee Court of Appeals (R. 276), and the Petition for Writ of Certiorari to the Supreme Court of Tennessee (R. 329), the interpretation of the terms within the Labor Management Relations Act arguably should be left to the tribunal which Congress has established to administer the Act. Regardless of what result the NLRB would have reached under Sections 7 or 8 (b) (4) of the Federal Act, since the Tennessee courts have intruded into the domain of Labor-Management relations, the judgment is void under the provisions of Art. I, Section 8, and Art. VI of the U. S. Constitution.

We now turn to the terms of the Act which the Tennessee Court of Appeals interpreted and applied without referring to any federal laws or controlling decisions.

Labor Dispute.

The term "labor dispute" is defined by Section 2 (9) of the National Labor Relations Act as follows:

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer or employee."

Appendix B, page 27.

In the case of **American Federation of Labor v. Swing, 312 U. S. 321,** it was expressly held that a requirement that there be an employer-employee relationship would be unconstitutional. The Tennessee Supreme Court followed the Swing case in **Watson v. Wilson, 187 Tenn. 402, 215 S. W. 2d 801.** In the Watson case the Tennessee Supreme Court held that a Union could peacefully picket a place of business where it had no members at all and did not seek or hope to have any.

More recent decisions of sister states were cited to the Tennessee courts at each stage of the hearings. The Texas case of **Ex parte Dilley, 334 S. W. 2d 425, 46 LRRM 2716,** is almost identical to the present labor dispute. In that case there was picketing at a construction site to protest working conditions. The Supreme Court of Texas did not hesitate to say that the dispute was arguably for the National Labor Relations Board. The Washington case of **Freeman v. Retail Clerks Union, 363 Pac. 2d 803,** decided July 20, 1961, was also cited to the Court wherein the Supreme Court of Washington stated there was no labor dispute between the employer and its employees, that the pickets were not employees and that the union had no contractual relationship with the employees, actual

or potential. The Washington court held that the matters were arguably for the National Labor Relations Board as the picketing was subject to Sections 7 or 8 of the Labor Management Relations Act.

The South Carolina Supreme Court decision, in the case of **Piedmont Shirt Company v. Amalgamated Clothing Workers, 115 S. E. 2d 499, 46 LRRM 2743**, was also cited as another case wherein there was no employer-employee relationship, actual or potential.

The only conclusion that can be drawn from the decision of the Tennessee Court of Appeals is that there must be an employer-employee relationship, or at least representatives of the union must discuss the matter with the employer before picketing would be permissible. Petitioners well remember the case of **Howard v. Haven, 198 Tenn. 572, 281 S. W. 2d 480**, originating under the same trial judge. In that case there was a conversation between a union business representative and an employer, and based upon that conversation the trial court held that the purpose of the picketing that followed was to cause a breach of contract and the non-union contractor who was dismissed from the job was entitled to treble damages under state law. The plight of the petitioners now under Tennessee law is that if a union merely discusses a controversy with an employer and someone is discharged, the union will be subjected to a damage suit for treble damages. In the event there is no conversation an injunction will issue prohibiting picketing because there is no labor dispute. It was submitted that the type of picketing in the instant case is a typical case of informational picketing.

It was argued to the Tennessee Court of Appeals that the facts presented a labor dispute concerning terms or conditions of employment in that respondents do not rec-

ognize or have union contracts. In the Brief filed with the Court of Appeals it was stated:

> "It is respectfully submitted that the interpretation of this term arguably should be left to the tribunal which Congress has left to administer the Act" (R. 276).

Since then this Court has acted on the question of interpretation of terms of the Act as presented in the case of **Engineers Association v. Interlake Steamship Company** (supra), wherein this Court specifically held the task in considering definitions of the Act "must in any doubtful case begin with the National Labor Relations Board" wherever a reasonably arguable case is made to that effect.

Commerce.

It is also submitted that the question of "affecting commerce" as defined by Section 2 (7) of the Act, Appendix B, page 27, should be left to the National Labor Relations Board when a reasonably arguable case is made to that effect.

This Court held in **Labor Board v. Faiblatt, 308 U. S. 601**, that the power of Congress to regulate interstate commerce is plenary and extends to all commerce be it great or small. The Faiblatt case was followed by the case of **NLRB v. Denver Building Trades Council, 341 U. S. 675.** In 1957 the cases of **Amalgamated Meatcutters v. Fairlawn, Inc., 353 U. S. 20,** and **Gus v. Utah Labor Relations Board, 353 U. S. 23,** were acted upon by this Court. This Court again made it clear that Congress had preempted the jurisdiction into the National Labor Relations Board and it was up to Congress to make any changes. In 1959 the United States Congress acted and in November, 1959, the new law went into effect. Under **Section 701 of the**

Landrum-Griffith Act, 29 U. S. C. 164, the Board was authorized to decline to assert jurisdiction where, in the opinion of the Board, the effect on commerce was not substantial. It was specifically provided that the Board was not able to decline jurisdiction over any labor dispute which it would have asserted jurisdiction under the standards prevailing on August 1, 1959.

Considering the possibility that the Trial Court might fail to take judicial cognizance of the Board's yardstick, counsel for petitioners wrote the National Labor Relations Board, Tenth Region, at Atlanta, Georgia, for an advisory opinion (R. 210) and received a reply (R. 213) which outlined the Board's jurisdictional standards.

The Board's jurisdictional standards require a showing that a non-retail employer has annual inflow and outflow of goods and services from or to persons outside the State amounting to $50,000.00. See **Siemon's Mailing Service, 43 LRRM 1056, 122 NLRB No. 13**, and the case of **Lennox-Haldman Co., 127 NLRB No. 49**. The Board will consider not only the operations of the primary employer but all of the operations of subcontractors or secondary employers involved. See **McAllester Transfer, Inc., 35 LRRM 1281, 110 NLRB No. 224; Reilly Cardage Co., 35 LRRM 1292, 110 NLRB No. 233**, and **Carpenters, etc., 111 NLRB 1025**.

The complaint as amended does not state whether respondents are engaged in intrastate or interstate commerce. The proof shows conclusively that the complainant, Rea Construction Company, is engaged in **interstate** commerce.

The principal witness of the aforesaid respondent was Fritz Diehl who is in charge of the Rea Construction Company at Cleveland, Tennessee. Mr. Diehl testified that

since the job in question started in July, 1960, the Rea Construction Company had spent about one million dollars of which one-half was for materials (R. 84, 85). Diehl's testimony was given on February 22, 1961 (R. 74). Diehl further estimated about seventy-five percent of the materials were purchased within the state and twenty-five percent outside the state (R. 95). On cross-examination Mr. Diehl was requested to check his figures with his Tennessee office as well as the principal office in North Carolina and file an accurate statement as to the materials purchased outside the state. This was done and filed as Exhibits 1 and 2 to the testimony of Fritz Diehl. Item 1 (c) shows that materials bought from sources outside of Tennessee to be $147,099.67 (R. 156). Accordingly, it is unnecessary to consider the other purchases at the involved projects of Rea Construction Company in North Carolina, Tennessee and Georgia. The NLRB had set its yardstick for commerce flowing into or out from a non-retail employer at $50,000.00 prior to 1959, and Congress, in the Landrum-Griffith Act, froze the yardstick at this point.

By the above yardstick a subcontractor, Lonas Construction Company, working at the time of the dispute, was also engaged in interstate commerce, and had been for two previous years. See testimony of Donald R. Gaither (R. 223-225), wherein he itemized purchases from a company totaling over $50,000.00 a year. The stipulation as to latter company which sold the machines shows that they were purchased from out of the state (R. 215).

Solicitors for petitioners were somewhat shocked when the Trial Court and Court of Appeals made no reference to the above facts and controlling cases, and merely stated in the written opinions that only intrastate commerce was involved. The record affirmatively shows that interstate commerce was involved.

Question of Mootness.

The question of mootness was not before the Honorable Tennessee Court of Appeals, yet it fortified its opinion by holding that all questions were moot. The court then proceeded to render a declaratory judgment and adopted the opinion of the Trial Court. Petitioners, in an earlier attempt to advance the case on the trial docket of the Court of Appeals had filed a motion (R. 289-295), stating that by the terms of the contracts respondents had with various construction companies the work was to be completed as of August 1, 1961. Petitioners' Motion for Advancement set forth the following:

> "The plight and predicament of appellants is very serious. All of the thousands of members covered by the Chattanooga Building Trades are engaged in the construction business. If they have a grievance which they wish to publicize they have a limited time to do so—only during the course of construction. Most projects require a year or less for completion. If the Trial Court takes a position which the appellants consider arbitrary or contrary to law they have no means to have the decision of the lower court reviewed. It is respectfully submitted that the employer complainant will delay the case with every legal means once a temporary injunction has been obtained. Once the construction project is over and the case becomes moot the employer will dismiss its bill and pay the costs rather than risk an appellate decision. Thus, the employer is in the enviable position in the field of labor-management of having the Trial Court to settle labor disputes by injunctive process."

The Court of Appeals refused to advance the case for hearing, and this cause came on to be heard for final argument on September 7, 1961. At that time the Court

of Appeals made inquiry as to the construction completion date and both petitioners and respondents agreed that the construction would continue for several weeks due to various construction delays. This fact is set forth in the sworn petition to the Tennessee Supreme Court (R. 311). The Court of Appeals proceeded to hear argument, accept briefs and no further evidence was submitted on the question. The Court of Appeals held the case for judicial determination until January 12, 1962, when it made its decision as set forth in Appendix A.

If the case became moot it did so only because the Tennessee State courts arbitrarily and illegally took jurisdiction. The case is not moot for the following reasons:

This Court has held, in the enforcement of National Labor Relations Board orders, that questions are not moot based upon the possibility of a recurrence, **NLRB v. Penna. Greyhound Lines, 303 U. S. 261.** This matter is arguably before the National Labor Relations Board. It is the desire of the petitioners to picket the respondents in the future under the same conditions, and unless relief is granted by this Honorable Court this will not be permitted under the law as interpreted by the Tennessee courts.

The Tennessee courts have the right to make advisory or declaratory judgments by Sections 23-1102 and 23-1103 of the Tennessee Code Annotated as set out in Appendix B. The Court of Appeals for the Eastern District of Tennessee made such an advisory opinion, and it is respectfully submitted that respondents are estopped from raising a question of mootness. If a court makes an advisory opinion, then it logically follows that a higher court has the authority to review that advisory opinion.

This case is similar to the case of **Plumbers v. County of Door, 359 U. S. 354,** wherein the question of mootness

was raised on oral argument before this Court but does not appear in the decision. A memorandum was submitted in that case, arguing that a case is not moot where, as here, (1) the injunction prohibits the petitioners from picketing at the location should the respondent contractor or any non-union employer be engaged to perform, repair or do maintenance work, (2) the underlying disputes between the petitioners and respondents have not been resolved, and (3) the petitioners' right under the state law to recover damages and court costs incurred in the course of resisting the issuance of the injunction is dependent upon the holding by this Court that the judgment below is erroneous.

Since the injunction is, by its terms, perpetual, the case is not mooted simply because a project which precipitated the strike has been completed. **Local 74, United Brotherhood of Carpenters v. NLRB, 341 U. S. 707, 715.** See also **Amalgamated Association v. Wisconsin Labor Board,** 340 U. S. 416, 417n. The granting of a temporary injunction in the present case was conditioned by the granting of an injunction bond (R. 9-10). The bond is still in full force and effect. Under Tennessee law a defendant, in a proceeding for a temporary injunction, is entitled to recover damages upon an injunction bond in the event it is ultimately determined that an injunction was erroneously issued. Unless the Court rules on the question presented herein, petitioners will be precluded from raising the question upon remand to the state courts.

Where, as here, a timely claim of federal preemption is made in a state court injunction proceeding, the cause should be presumed justiciable in the absence of a clear and convincing showing that the matter has become moot. Every building project is necessarily completed at some definite point in time. Inherent delays in litigating cases

through state courts makes it impossible to bring the case to this Court as a practical matter until most buildings have been completed. E. G. **Local 74, United Brotherhood of Carpenters v. NLRB, 341 U. S. 707, 715.**

Preemption.

The decision by the Tennessee Court of Appeals is similar to those decisions of the Tennessee Appellate Courts in the cases of **Kerrigan Iron Works v. Cook Truck Lines, 296 S. W. 2d 379,** and **Farnsworth & Chambers v. Local Union 429, Electrical Workers, 299 S. W. 2d 8,** which this Court reversed on May 27, 1957, **353 U. S. 968, 969.** The controlling cases of **San Diego Building Trades Council v. Gorman, 359 U. S. 236,** and **Engineers Ass'n v. Interlake Steamship Company** (supra), fully cover this issue.

The Court of Appeals for the Eastern Section has very strong views of its own in labor-management questions, perhaps best illustrated by the concurring opinion in the case of **Volunteer Electric Corp. v. Gann,** decided September 8, 1960, not reported in the official reports but reported at **46 LRRM 3049.**

It is submitted that unless the present decision is reversed the checker-board system, which this Court condemned in the case of **Garner v. Teamsters, 346 U. S. 485,** will be given new life. Prior to the present decision most of our state trial courts recognized the doctrine of preemption.

Under the present decision which is binding on every court in the state of Tennessee the doctrine of preemption no longer exists. Labor-management disputes are left to the whims of trial judges in resolving industrial disputes.

CONCLUSION.

For the foregoing reasons it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

By .....
H. G. B. KING,
KING & FUSTON,
723 Chattanooga Bank Building,
Chattanooga, Tennessee,
Counsel for Petitioners.

Dated: November ..., 1962.

KING & FUSTON,
723 Chattanooga Bank Building,
Chattanooga, Tennessee,
S. D. FUSTON,
723 Chattanooga Bank Building,
Chattanooga, Tennessee,
Of Counsel.

APPENDIX A.

(Filed January 12, 1962.)

(R. 296-304.)

In the Court of Appeals of Tennessee,
Eastern Section.

Jafco, Inc., et al.
vs.
N. L. Liner et al.

Bradley Equity.
Hon. Glenn W. Woodlee,
Chancellor.

For complainants-appellees: Jac Chambliss, Chattanooga, and Jas. F. Corn, Cleveland, Tenn.

For defendants-appellants, King & Fuston, Chattanooga, Tenn.

Hale, J.

Opinion.

The issues in this case submitted to the Chancellor are fully set forth in his memorandum opinion, viz.,

"Jafco, is a Tennessee Corporation having its only office and place of business located in the City of Cleveland, Bradley County, Tennessee.

"Rea Construction Company, is a foreign Corporation licensed to do business in the State of Tennessee.

"Jafco is the owner and in possession of land located within the corporate limits of the City of Cleveland, Bradley County, Tenn., on which it is presently erecting what is commonly referred to as a shopping center. It is estimated that this development will cost $2,000,000.00, or more; and in order to make possible

its erection and/or completion Jafco was required to enter into an agreement with its tenants that the various buildings under construction would be completed and ready for occupancy upon certain dates, the latest of which is September 1, 1961; and failing in this the tenants, respectively, have the right to cancel rental contracts heretofore made. This, the bill charges and the Court finds from the proof in support thereof, that time is of the essence in the performance of various contracts entered into, otherwise this large venture might well falter and fail if solemn agreements made in good faith are not carried out.

"To erect this shopping center Jafco contracted with Rea Construction Co., Rea Construction Co. thereafter contracted with Lonas Construction Co., operators of heavy equipment, to grade the area required for this large shopping center.

"The parties were thus engaged in the pursuit of this program when on Monday, August 8, 1960, the defendant N. L. Liner appeared on the scene and started picketing the job, bearing a sign which read:

> "'Rea Construction Co., not under contract with Chattanooga Building Trades Council, A. F. of L.'

"The contractors had in their employ men who belonged to the union and those who did not.

"Immediately upon establishing the picket line the union men, most of whom were engaged in the operation of the heavy equipment, walked off the job, the effect of which was to shut it down.

"On the same day the picket line was established this bill was filed and upon fiat of this court, a temporary injunction issued enjoining picketing. N. L. Liner, a citizen and resident of Bradley County, who

was engaged in picketing, Local 846 of the Hod Carriers and Common Laborers Union of America, an unincorporated Association of Labor Organization, having its principal office at 540 Vine Street, Chattanooga, Chattanooga Building Trades Council AFL, an unincorporated Association or Labor Organization, having its principal office and place of business at 540 Vine Street, Chattanooga and Hod Carriers Building and Common Laborers Union of America, an International Union or unincorporated Association or Trade Union which is a non-resident of Tennessee, were named defendants.

"The bill initially filed by Jafco, Inc., was later amended to include Rea Construction Co., as one of the complainants.

"Defendants Local Union 846, Hod Carriers Building & Common Laborers Union of America an international organization filed separate demurrers challenging complainant's right to maintain the suit and specifically plead (1) the Court is without jurisdiction of the subject matter, and (2) defendant's act of peaceful picketing is but a mere exercise of the right of free speech which is guaranteed both by the Federal and State constitutions.

"There was a motion to dissolve the injunction which was heard by Chancellor H. J. Garrett who overruled the motion. He also overruled the demurrers and required the demurrants to answer with leave to rely upon the questions made by demurrers in the answers and at the hearing.

"After the cause was at issue proof was taken; and on an adjourned day of the regular April term the cause was argued and subsequently briefs were filed by solicitors for the parties, respectively.

"Defendant's principal contention involves the question of the Court's jurisdiction. Their able solicitors argue that the National Labor Relations Board has sole and exclusive jurisdiction because Interstate Commerce is involved here.

"The Court is of opinion and, therefore, finds that the erection of the shopping center does not involve Interstate Commerce. It is a localized action and by no definition of the term can it be said that this operation amounts to Interstate Commerce. But, if it did, there was no labor dispute.

"The job was proceeding smoothly and without interruption until the Chattanooga Trades Council voted to place a picket on the job. Their excuse for this was simply to 'advertise to the public when making future contracts that Rea was not under contract with Chattanooga Building Trades Council.'"

"Now, with respect to the right of peaceful picketing and, as in this case by strangers or third parties, the insistence made that it was the exercise of free speech and lawful is farfetched. The defendants involved here had no contract with complainants nor had they even attempted to negotiate one. The insistence that they were there to 'advertise to the public' for future purposes is but a mere pretext for their real purpose which was to shut down this project and thus cause the breach of contracts previously negotiated and valid under the laws of Tennessee.

"As late as December the Supreme Court of Tennessee in the case of Clyde Harrison Large v. Arlin Dick et al., 343 S. W. 2d 693, held:

> "'That every man has the right to property in his own labor, and the right to work without interference; and whoever intentionally interferes

with this right is liable in tort for the damage caused, unless he can show a privilege or justification for such interference.' "

"In this case the Court has found no privilege or justification for defendants' intentional interference with complainants and their employees' right to negotiate and execute contracts, breach of which would result in irreparable damages to complainant, Jafco.

"In conclusion it will be observed that defendants have been free at all times to apply to the National Labor Relations Board for relief had they thought this Board had jurisdiction. Their failure to seek such relief leaves but one obvious conclusion, that the Board is without jurisdiction.

"Thus, the bill will be sustained and the injunction heretofore issued will be made perpetual."

Decree was entered accordingly, from which the defendants duly prayed, were granted and have perfected this appeal. There are several assignments of error. All must be overruled.

In the first place the questions in this case have become moot. The appellants in brief filed June 22nd, 1961, in which they were seeking to advance the cause for hearing, stated:

"In the instant case, the right of picketing will become moot by August 1, 1961, as the construction will be completed and the building ready for occupancy. Appellants know that they desire to picket one of the complainants, Rea Construction Company, this coming fall on a project which will require approximately six or eight months of construction. Without judicial review of this case they can only expect the same Trial Court to act the same, and

again they cannot possibly get the case to the appellate court for a decision within that time."

We have too much work to do to prevent us from attempting to render advisory opinions in future litigation that may or may not arise.

In Malone v. Peay, 157 Tenn. 429, there was involved an attempt to obtain an injunction to prevent the purchase of lands for the Smoky Mountain Park. It was denied by the trial court. Complainants appealed and on that appeal the Supreme Court, speaking through Mr. Chief Justice Green, said:

"At the bar of this court it was conceded that the purchase of the lands, sought to be enjoined, had been consummated. Such being the fact, the bill presents only a moot case, insofar as it seeks an injunction. An injunction would accomplish nothing now, and the bill in this aspect cannot be maintained."

The same principle applies to suits under the Ouster Law. In State ex rel. v. Hassler, 196 Tenn. 158, the relators had unsuccessfully sought to oust a County School Superintendent, and then appealed to the Supreme Court. Pending the appeal the defendant's term expired and he was duly elected to succeed himself. It was held that the appeal could not be entertained, and was dismissed at the cost of appellants.

Further, we concur with the Chancellor's finding that a bona fide labor dispute did not exist. Defendants never at any time sought to obtain a contract from the Rea Construction Company which had a policy of employing union and non-union personnel without discrimination.

Defendants say that when they placed this picket on the line it was merely for education. We cannot accept that

explanation which doesn't explain. They knew that when this picket was placed at this entrance to the work that it would result in union employees refusing to cross the line, and this is exactly what happened, thus causing a complete work stoppage. In short, we find that the action of the defendants was spiteful and malicious in an attempt to injure both Jafco, Inc., and the Rea Construction Company.

What has been said requires the affirmance of the decree below, with cost against the appellants and surety on appeal bond.

Affirmed.

Hale, J.

Concur:

McAmis, P. J.

Cooper, J.

In the Court of Appeals of Tennessee, at Knoxville,
May Term, 1961.

Tuesday, January 16th, 1962.

Court met pursuant to adjournment present and presiding the Honorable Judges Luke M. McAmis, Winfield B. Hale and R. E. Cooper.

The minutes of yesterday were read and signed when the following proceedings were had to-wit:

Filed Jan. 12, 1962,
W. H. Eagle, Clerk.

Jafco, Inc., et al.
vs.
N. L. Liner, et al.

Bradley Equity.
Affirmed.

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Bradley County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that the costs of the cause will be paid by N. L. Liner, Local 846, Hod-Carriers Union, Chattanooga Building Trade, AFL, Hod Carriers Bldg., Common Laborers Union of America et al., and Surety Fidelity and Deposit Company of Maryland, for which let execution issue.

APPENDIX B.

Pertinent Statutory Provisions.

29 U. S. C., Sec. 152. **Definitions.**

When used in this subchapter—

"• • •

(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

• • •

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer or employee."

29 U. S. C., Sec. 157. **Right of Employees as to Organization, Collective Bargaining, Etc.**

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

29 U. S. C., Sec. 158 (b) (4).

"(b) It shall be unfair labor practice for a labor organization or its agents—

• • •

(4) (i) To engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if

another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;"

Tennessee Code Annotated, Section 23-1102. General Power of Courts.

"Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree."

Tennessee Code Annotated, Section 23-1103. Construction of statutes and written instruments.

"Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder."

Tennessee Code Annotated, Section 47-1706. Procurement of breach of contracts unlawful—Treble damages.

"It shall be unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of said contract; and the party injured by such breach may bring his suit for said breach and for such damages."

Tennessee Code Annotated, Section 50-208. Denial of employment because of affiliation or nonaffiliation with labor union unlawful.

"It shall be unlawful for any person, firm, corporation or association of any kind to deny or attempt to deny employment to any person by reason of such person's membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind."

Tennessee Code Annotated, Section 50-209. Contracting for exclusion from employment because of affiliation or nonaffiliation with labor union unlawful.

"It shall be unlawful for any person, firm, corporation or association of any kind to enter into any contract, combination or agreement, written or oral, providing for exclusion from employment of any person because of membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind."

APPENDIX C.

In the Chancery Court, Bradley County,
Cleveland, Tennessee.

Jafco, Inc., et als.
vs.
N. L. Liner et als.
No. 6377.

(Filed September 30, 1960.)

(R. 38-40.)

Memo.

This matter is before the Court on a motion to dissolve, on bill and answer, the temporary injunction heretofore issued in the case.

The Complainant, Jafco, Inc., is engaged in building a shopping center in the center of Cleveland, Bradley County, Tennessee. The cost of said shopping center is approximately $2,000,000. The Complainant Rea Construction Company is the general building contractor in charge of and carrying out said construction. The completion date of the contract of construction is August 1, 1961. Subcontractors of the Rea Construction Company are engaged in moving dirt on the building site. On Monday, August 8, 1960, the defendant N. L. Liner appeared at the scene of the construction with a picket sign and began to picket said site. The picket sign charged as follows: "Rea Construction Company not under contract with Chattanooga Building Trades Council, A. F. L." Soon after the picket was on the scene the work on the project completely stopped because the workers refused to work while the picket was there. The original bill in this cause was filed on August 9, 1960, and fiat for injunction issued on

application of the petitioners before the filing of the bill on August 8, 1961. With the restraint of the pickets the construction continued. It is apparent from the pleading that there is no labor dispute in existence between complainants and the defendant, the defendants are not seeking a contract with the complainant.

It is the theory and insistence of the complainants that the existence of labor dispute is a prerequisite for obtaining jurisdiction of the National Labor Relations Board and that since it is not a labor dispute that that board is without jurisdiction to intervene. Various authority is cited by complainants to show that the state courts have jurisdiction. Authority is also cited by the complainants, Gibson's Suits in Chancery, Section 898, prohibiting the dissolution of an injunction where the dissolution of the injunction would be tantamount to a decision on the merits or where the injunction is the real remedial part of the bill. The insistence is also made that the question of the jurisdiction of this court should properly be raised by a plea in abatement or demurrer. The record shows that a demurrer was filed on the 12th day of September, 1960. Further complainants contend that the action of the defendants is contrary to the statutory law of this state described as the Tennessee anti-closed shop law and that the effect of the picketing is to stop work on the project and thereby cause a breach of contract which if prohibited by the Tennessee Statute prohibiting third party interference in tracts.

It is the insistence of the defendants, on the other hand, that there is no complaint of violence or mass picketing, that its sole purpose is to advertise and let the public know in the vicinity of the construction that the Rea Construction Company is not under union contract and that they have a right to so advertise in this manner. And further that the state courts have no jurisdiction and that the conduct of the defendants is protected under the

National Labor Relations Act. It is also argued in behalf of defendants that due to the size of this operation that the contractors are engaged in interstate commerce. They also deny that the actions of the defendant in any way violate the so-called right to work law of this state or any other law. It is further argued that if an injunction of this nature is allowed to stay in effect the union has no practical way of reaching the public to advertise the truth, and that if in effect destroys their right to picket.

I think it is patently obvious in this case that the injunction relief sought is in fact the remedial part of the bill and its dissolution would be the equivalent of a decision on the merits. It is further the view of the court that there is no bona fide labor dispute between the parties in this litigation and that the existence of a labor dispute is a prerequisite, along with the involvement of interstate commerce, for the National Labor Relations Board before obtaining jurisdiction. I think it is clear from these facts that the National Labor Relations Board has not preempted the state courts' rights in a case resting on the foregoing facts, under the Aladdin Industries case, 23 S. W. (2d) 322, and in the case of Newport Industries v. Lake Charles Metal Trades Council, U. S. District Court for the Western District of Louisiana, 17 Labor Cases 65, 284.

In view of the foregoing I feel that I must overrule the motion to dissolve the injunction. The demurrers filed September 12th are also overruled but the defendant is allowed to rely upon the same in his answer and the case is remanded to the rules for proof.

So Order:

This the 29th day of September, 1960.

H. J. Garrett,
Chancellor.

Jafco, Inc., et al.,
vs.
N. L. Liner, et al.
No. 6377.

In the Chancery Court of Bradley County, Tennessee.

(Filed March 10, 1961.)

(R. 41).

Order.

This cause came on to be heard before the Court on a motion to dissolve, on bill and answer, the temporary injunction heretofore issued in the case, and after hearing argument of said motion and studying the briefs filed in connection therewith, the Court is of the opinion that said motion is not well taken for the following reasons:

1. It is obvious that the injunctive relief sought is in fact a remedial part of the bill, and its dissolution would be the equivalent of a decision of the case on its merits, and such is forbidden by the Chancery practice of this state.

2. There is no bona fide labor dispute between the parties in this litigation and therefore the state court has jurisdiction of the matter and the same has not been preempted by the National Labor Relations Board.

The motion to dissolve the injunction is accordingly overruled and disallowed.

It is further the order of the Court that the demurrers filed on September 12 and submitted to the Court simultaneously with the motion to dissolve are also overruled, but the defendant is allowed to rely upon the same in his answer.

It is further ordered that the case be and the same hereby is remanded to the rules for the taking of proof.

H. J. Garrett,
Chancellor.

O. K.

Jac Chambliss,
Solicitors for Complainants.

.....
Solicitors for Defendants.

Jafco, Inc., et al.,
vs.
N. L. Liner, et al.
} No. 6377.

In the Chancery Court at Cleveland, Tennessee.

(Filed June 2, 1961.)

(R. 247-250.)

Memo.

Jafco is a Tennessee Corporation having its only office and place of business located in the City of Cleveland, Bradley County, Tennessee.

Rea Construction Company is a foreign Corporation, licensed to do business in the State of Tennessee.

Jafco is the owner and in possession of land located within the corporate limits of the City of Cleveland, Bradley County, Tennessee, on which it is presently erecting what is commonly referred to as a shopping center. It is estimated that this development will cost $2,000,000.00, or more; and in order to make possible its erection and/or completion Jafco was required to enter into an agreement with its tenants that the various buildings under con-

struction would be completed and ready for occupancy upon certain dates, the latest of which is September 1, 1961, and failing in this the tenants, respectively, have the right to cancel rental contracts heretofore made. Thus, the bill charges and the Court finds from the proof in support thereof, that time is of the essence in the performance of various contracts entered into, otherwise this large venture might well falter and fail if solemn agreements made in good faith are not carried out.

To erect this shopping center Jafco contracted with Rea Construction Co. Rea Construction Co., thereafter contracted with Lonas Construction Co., Inc., operators of heavy equipment, to grade the area required for this large shopping center.

The parties were thus engaged in the pursuit of this program when on Monday, August 8, 1960, the defendant N. L. Liner appeared on the scene and started picketing the job, bearing a sign which read:

"Rea Construction Co., not under contract with Chattanooga Building Trades Council, A. F. of L."

The contractors had in their employ men who belonged to the union and those who did not.

Immediately upon establishing the picket line the union men, most of whom were engaged in the operation of the heavy equipment, walked off the job, the effect of which was to shut it down.

On the same day the picket line was established this bill was filled and upon fiat of this Court, a temporary injunction issued enjoining picketing. N. L. Liner, a citizen and resident of Bradley County, who was engaged in picketing, Local 846 of the Hod Carriers and Common Laborers Union of America, an unincorporated Association or Labor Organization, having its principal office at 540 Vine Street, Chattanooga, Chattanooga Building Trades

Council AFL, an unincorporated Association or Labor Organization, having its principal office and place of business at 540 Vine Street, Chattanooga, and Hod Carriers Building and Common Laborers Union of America, an International Union or unincorporated Association or Trade Union which is a non-resident of Tennessee, were named defendants.

The bill initially filed by Jafco, Inc., was later amended to include Rea Construction Co., as one of the complainants.

Defendants, Local Union 846, Hod Carriers Building & Common Laborers Union of America and Hod Carriers Building and Common Laborers Union of America, an international organization, filed separate demurrers challenging complainants' right to maintain the suit against either or both of these defendants. N. L. Liner and the Chattanooga Building Trades Council AFL, filed a joint answer challenging complainants' right to maintain the suit and specifically plead (1) the Court is without jurisdiction of the subject matter, and (2) defendant's act of peaceful picketing is but a mere exercise of the right of free speech which is guaranteed both by the Federal and State Constitutions.

There was a motion to dissolve the injunction which was heard by Chancellor H. J. Garrett who overruled the motion. He also overruled the demurrers and required the demurrants to answer with leave to rely upon the questions made by demurrers in the answers and at the hearing.

After the cause was at issue proof was taken; and on an adjourned day of the regular April term the cause was argued and subsequently briefs were filed by solicitors for the parties, respectively.

Defendants' principal contention involves the question of the Court's jurisdiction. Their able solicitors argue that the National Labor Relations Board has sole and exclusive jurisdiction because Interstate Commerce is involved here.

The Court is of opinion and, therefore, finds, that the erection of the shopping center does not involve Interstate Commerce. It is a localized action and by no definition of the term can it be said that this operation amounts to Interstate Commerce. But, if it did, there was no labor dispute.

The job was proceeding smoothly and without interruption until the Chattanooga Trades Council voted to place a picket on the job. Their excuse for this was simply to "advertise to the public when making future contracts that Rea was not under contract with Chattanooga Building Trades Council."

Now, with respect to the right of peaceful picketing and, as in this case by strangers or third parties, the insistance made that it was the exercise of free speech and lawful is far-fetched. The defendants involved here had no contract with complainants nor had they even attempted to negotiate one. The insistence that they were there to "advertise to the public" for future purposes is but a mere pretext for their real purpose which was to shut down this project and thus cause the breach of contracts previously negotiated and valid under the laws of Tennessee.

As late as December the Supreme Court of Tennessee in the case of Clyde Harrison Large v. Arlin Dick et al., 343 S. W. 2d 693, held:

> "That every man has the right of property in his own labor, and the right to work without interference; and whoever intentionally interferes with this right is liable in torte for the damage caused, unless he can

show a privilege or justification for such interference."

In this case the Court has found no privilege or justification for defendants' intentional interference with complainants and their employees right to negotiate and execute contracts, breach of which would result in irreparable damages to complainant, Jafco.

In conclusion it will be observed that defendants have been free at all times to apply to the National Labor Relations Board for relief had they thought this Board had jurisdiction. Their failure to seek such relief leaves but one obvious conclusion, that the Board is without jurisdiction.

Thus, the bill will be sustained and the injunction heretofore issued will be made perpetual.

The defendants will have 30 days in which to perfect their appeal.

So decree.

This May 31, 1961.

s/ Glenn W. Woodlee, Chancellor.

Circuit Court, Bradley County, Tennessee.

Jafco, Inc., et al.
vs.
N. L. Liner, et al.
No. 6377.

(Filed June 15, 1961, R. 251-252.)

Final Decree.

This cause came on to be heard before the Honorable Glenn W. Woodlee, Chancellor, holding the Chancery Court of Bradley County at Cleveland, Tennessee, upon

the Bill for Injunction as amended, the answers of all the defendants, the depositions and stipulation of the parties, the briefs of the respective parties, the oral argument of the solicitors in this cause, and the entire record, from all of which it appears that the complainants are entitled to an injunction as sought by reason of the findings and conclusions of law set forth in the Chancellor's memorandum heretofore filed on the second day of June, 1961, which said memorandum is incorporated herein by reference in its entirety but not for copy, it is therefore

Ordered, Adjudged and Decreed by the Court that the injunction heretofore granted in this cause prohibiting and restraining the defendants and all their pickets, strikers and sympathizers from picketing the JAFCO, Inc. shopping center site in Cleveland, Tennessee or in any other manner interfering with the performance of said job is hereby continued and made perpetual.

The costs are taxed against the defendants for which execution may issue.

To all of which Decree and all previous orders of the Court the defendants duly except and pray an appeal to the Court of Appeals sitting at Knoxville, Tennessee, which is hereby granted upon the execution of an appeal bond and otherwise perfecting the appeal in the manner provided by law.

This 16th day of June, 1961.

G. W. Woodlee,
Chancellor.

Approved:

Jac Chambliss,
James F. Corn,
Solicitors for Complainants.

King & Fuston,
Solicitors for Defendant.

APPENDIX D.

(Filed September 3, 1960.)

(R. 29-35.)

Chancery Court, Bradley County, Tennessee.

Jafco, Inc., et al.,
vs.
N. L. Liner.
} No. 6377.

Answer.

Come the defendants, with the exception of Hod Carriers, Building and Common Laborers Union of America, an International Union, and Local 846 thereof, in the capacities in which they are used, and for answer to so much and such parts of the bill as they are advised is relevant, material and necessary to answer, say:

The original bill has been superseded by an amended and supplemental bill, the amended and supplemental bill contains all of the allegations of the original bill and in addition thereto other allegations, therefore each of the above defendants answering individually, for their joint, separate and several answers to the amended and supplemental bill say:

I.

The allegations contained in Paragraph I of the Amended and Supplemental bill are denied. The Parties may be subject to the jurisdiction of the Court, but the Court does not have jurisdiction of the subject matter as will be shown hereinafter.

II.

It is admitted that the complainant, Jafco, Inc., is a corporation engaged in the building of a vast shopping center

in Cleveland, Tennessee, to cost in the neighborhood of $2,000,000.00. It is also admitted that Rea Construction Company is the general building contractor and in charge of construction. These defendants would show to the Court that due to the size and magnitude of the project that both complainants are engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended.

III.

It is admitted, on information and belief, that the complainant, Jafco, Inc., has entered into a written contract with complainant, Rea Construction Company. These defendants have not been advised of the terms of the contract, but allege that said provisions will speak for themselves.

It is assumed that said contract has the normal and customary provision that relieves the parties of the time element in the event of labor difficulty.

It is denied that the parties would suffer irreparable damage or be subject to a cancellation of the contract in the event the contract is not performed by a certain time.

The allegations in regard to Jafco, Inc., having to cancel contracts with its tenants is denied and strict proof demanded. In the event that any of the complainants suffer any damages the same is incidental and damages for which no action lies.

IV.

On information and belief it is probably true that complainant, Jafco, Inc, has entered into separate contracts with various subcontractors. It is denied that complainants will suffer great and irreparable damage and loss in the event there are normal and lawful interruptions caused by legitimate and protected labor advertising.

V.

All of the allegations contained in Paragraph V are denied in the event same become material.

VI.

It is admitted that work has begun on said project but it is denied that any work was stopped by the activities of defendants. It is specifically denied that there has been any illegal activity on the part of any of the defendants.

VII.

The allegations contained in Paragraph VII are denied and strict proof demanded.

VIII.

It is admitted that the defendant, N. L. Liner, appeared on the scene of construction bearing a picket sign which truthfully stated that Rea Construction Company was not under contract with Chattanooga Building Trades Council, AFL. Complainants tacitly admit the truth of the banner. It is denied that the defendant, N. L. Liner, was the agent or acted in any capacity for the defendant Local 846 or of Hod Carriers International Union.

Defendants would show that the Chattanooga Building Trades Council embraces several counties in Tennessee, one of which is Bradley County; that a great many of the members of organized labor live in Bradley County and customarily work on projects in that County, as well as in Hamilton County, and other counties in the vicinity. All other allegations of Paragraph VIII are denied and strict proof demanded.

IX.

The allegations contained in Paragraph IX are denied and strict proof demanded.

X.

All allegations contained in Paragraph X are denied and strict proof demanded. These defendants would show to the Court that the Tennessee Common Law and Tennessee Statutory Law does not apply to interstate commerce where the National Labor Relations Board has jurisdiction.

XI.

The allegations contained in Paragraph XI are denied and strict proof demanded.

XII.

The allegations of Paragraph XII are denied and strict proof demanded.

It is alleged that the said contracts are not material in those cases involving interstate commerce where the National Labor Relations Board has full and complete jurisdiction. In the event that the contracts referred to become material, these defendants again allege that complainants could and should have protected themselves by the customary labor provision in their contracts.

XIII.

These defendants admit that Sections 50-208 and 20-209 of the Tennessee Code Annotated are correctly quoted. These defendants would show however, that said sections have no application to a cause of action affecting interstate commerce which is subject to the National Labor Relations Act. In the event said sections become material the innuendo that these defendants might be violating said sections is denied and strict proof demanded.

XIV.

The allegations of Paragraph XIV are denied and strict proof demanded. Again, these defendants would show to

the Court that interstate commerce is involved and that the allegations contained in said paragraph are immaterial where the National Labor Relations Board has full and complete jurisdiction.

XV.

The allegations contained in Paragraph XV are denied and strict proof demanded.

These defendants would show to the Court that the purpose of the picketing is to inform members of organized labor in Cleveland and vicinity, sympathizers of the Labor Movement, and the public in general, that the complainant's project is not under contract with appropriate bargaining labor organizations. The effect that is sought is that persons who hire contractors hereafter will know which are union contractors and which are not. If those people desire to hire such contractors as complainants they are so informed, or if they desire contractors who maintain union contracts they are so informed. It is the hope of organized labor that the public, once informed, will hire contractors who agree to contracts protecting the employees as to wages, hours and working conditions. Without such publicity there would be no effective way of informing the public in that vicinity.

The allegations contained in the last paragraph immediately prior to the prayer for relief is denied. In the event that the allegations regarding the loss of money, damages, loss of contracts, invasion of property rights and such, become material it is alleged that they are damnum absque injuria.

XVI.

All allegations of the original bill, as amended by the amended and supplemental bill, not heretofore denied, explained or admitted are here and now denied as though specifically denied.

XVII.

And now for further answer and defense, these defendants aver that the allegations of the original bill as amended charge nothing other than peaceful picketing with a banner which speaks the truth. The alleged purposes are conclusions, and are matters for the National Labor Relations Board.

The general overall purpose of complainants' bill is to avert the purposes and policies of the National Labor Relations Act as amended by preventing peaceful picketing. The conduct of the picketing is either protected conduct or unlawful conduct within the meaning of the National Labor Relations Act as amended. In either event the National Labor Relations Board has sole and exclusive jurisdiction of the subject matter.

Therefore, this Court is without power or authority to decide the issues in this cause, and any judgment rendered by this Court, other than an order of dismissal, would be null and void.

XVIII.

For further defense, these defendants allege that the Court is without jurisdiction to restrain peaceful picketing for the reason that the granting of such injunction would be to deprive these defendants of the right of free speech guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, and the rights guaranteed by the Constitution of the State of Tennessee.

And now having fully answered these defendants pray to be dismissed with their reasonable costs.

S. Del Fuston,
For King & Fuston,
Solicitors for Answering Defendants,
723 Chattanooga Bank Building,
Chattanooga, Tennessee.

State of Tennessee,
County of Hamilton.

C. Earle Williams, being first duly sworn, makes oath that he is President of the Chattanooga Building & Construction Trades Council, that he has read the foregoing answer and the facts and statements contained therein are true of his own knowledge, information and belief.

C. Earle Williams.

C. Earle Williams.

Sworn to and subscribed before me, this 2nd day of September, 1960.

My Comm. Expires 10-14-61.

Nixola Ziegler,
Notary Public.

In the Chancery Court Bradley County,
Cleveland Tennessee.

Jafco, Inc., et al.,
v.
N. L. Liner, et al.
No. 6377.

(Filed September 3, 1960.)

(R. 28.)

Motion to Dissolve Injunction and Dismiss Bill.

Come defendants, by their solicitors, and move the Court to dissolve the injunction heretofore granted in this cause and to dismiss the bill on the following grounds, to-wit:

1. There is no equity on the face of the bill of complaint.

2. On Bill and Answer.

3. This Court is without jurisdiction to grant an injunction against peaceful picketing because:

(a) It constitutes an encroachment upon the exclusive jurisdiction of the National Labor Relations Board over the subject matter.

(b) The injunction against peaceful picketing violates defendants' right of freedom of speech as guaranteed by the constitutions of the United States and of the State of Tennessee.

/s/ S. Del Fuston,
For King & Fuston,
Solicitors for Chattanooga Bldg. Trades.

Certificate of Service.

This 2nd day of Sept., 1960.

By: S. Del Fuston.

In the Court of Appeals of Tennessee
at Knoxville, Tennessee.

Jafco, Inc., et al.,
vs.
N. L. Liner, et al.
No. 1.
Bradley County
Equity Docket.

Statement of Case, Assignment of Errors, Brief and Argument of Appellants.

(Filed June 22, 1961.)

(R. 258-278.)

(Pages 1-3 and 9-19 are not reprinted.)

Assignment of Error.

I.

The Chancellor erred in ordering, adjudging and decreeing that a temporary injunction issue prohibiting the defendants and all the pickets, strikers and sympathizers

from picketing the JAFCO, Inc., shopping center site in Cleveland, Tennessee, or in any other manner interfering with the performance of said job (R. 9); by failure to dissolve the injunction at the hearing on the Motion to Dismiss (R. 38), and by making said injunction permanent in the Final Decision (R. 251).

The Court in rendering the injunction necessarily had to take jurisdiction of the subject matter.

The Bill of Complaint as amended alleges conduct that is prohibited by Sec. 8 (b) (4) (i) (ii) of the National Labor Relations Act as amended in 1959 (29 USC 158). The appellants contend that the conduct is protected by Section 7 of the National Labor Relations Act. The conclusion that can be drawn is that the conduct is either protected or prohibited. In either event a controversy is present that can only be resolved by the National Labor Relations Board.

Congress has pre-empted jurisdiction in the subject matter in the National Labor Relations Board.

San Diego Building Trades Council v. Garmon, 359 U. S. 236, 79 S. Ct. 773, April 20, 1959.

In the Garman case the Supreme Court held that the complaining party must go to the National Labor Relations Board if the conduct arguably falls within the protection of the National Labor Relations Act, Section 7, or is prohibited conduct set forth in Section 8. For a list of authorities see

Wagner v. Hartnitt, Del. Sup. Court, July 16, 1959, 153 A. 2d 584, 44 LRRM 2980;

Piedmont Shirt Co. v. Amalgamated Clothing Wkrs., July 18, 1960, Sup. Ct. of S. C., 115 S. E. 2d 499, 46 LRRM 2743;

Dempsey v. Great Atl. & Pac. Tea Co., Nov. 2, 1960, 208 N. Y. S. 2d 18 (N. Y. Sup. Ct.)

II.

The Court erred in ordering, adjudging and decreeing that only intrastate commerce was involved in this cause. Opinion (R. 249), and incorporated in Final Decree (R. 251).

The power of Congress to regulate interstate commerce is plenary and extends to all commerce, be it great or small.

See Labor Board v. Faiblatt, 306 U. S. 601.

In 1959 Congress froze the National Labor Relations Board's jurisdictional standards that were in effect **29 U. S. C. 164.**

The Board's jurisdictional standards require showing that a non-retail employer has an annual inflow or outflow of goods and services from and to persons outside the state amounting to only $50,000.00.

See letter from NLRB, R. 213, listing:

Seimons Mailing Service, 43 NLRB 1056, 122 NLRB 13.

The Board will also consider the operation of the secondary employers involved.

McAllester Trans. Co., 35 LRRM 1281.

The only testimony of the prime contractor, Rea Construction Company, was by its chief official of the construction job, Fritz Diehl. He testified that in the first ten months of operation this company purchased $147,096.67 in materials from outside the State of Tennessee. See Exhibit I, Diehl's testimony (R. 156).

The secondary employer, Lonas Construction Company, was also engaged in interstate commerce within the meaning of the Act. See testimony of Donald R. Gaither (R. 223-225) wherein he testified as to the amount of machinery

purchased from the Nixon Machinery & Supply Company, and the stipulation as to where the machines were purchased by the Nixon Company (R. 215).

III.

The Chancellor erred in ordering, adjudging and decreeing that there was no labor dispute, Opinion of the Court, (R. 249), incorporated in Final Decree (R. 251).

This is a matter for the National Labor Relations Board to interpret since the case arguably should be before the National Labor Relations Board.

The definition of a "Labor Dispute" as defined by the National Labor Relations Act includes any controversy regardless of how the disputants stand in the approximate relation of employer and employee, 29 U. S. C. A. 152. See

Am. Fed. of Labor v. Swing, 312 U. S. 321.

And the same definition followed by the Supreme Court of Tennessee in

Watson v. Wilson, 187 Tenn. 402, 215 S. W. 2d 801;

Said cases hold that peaceful picketing is lawful without the presence of a labor dispute.

IV.

The Court erred in ordering, adjudging and decreeing an injunction against peaceful picketing under state laws as the injunction is in violation of the 14th Amendment of the Constitution of the United States. See **Watson v. Wilson, 187 Tenn. 402, 215 S. W. 2d 801.**

V.

The Chancellor erred in ordering, adjudging and decreeing that the Demurrer of the Hodcarriers Local 846 and the International Hodcarriers Union be overruled (R. 38-41), and in its failure to dismiss said parties in the Final Decree (R. 251).

There are no facts in the complaint as amended showing that Local 846 participated in the picketing other than as a member of the Chattanooga Building Trades.

There are no facts involving the International Union and the International is not responsible for the acts of its Local.

Coronado Co. v. U. Mine Wkrs., 268 U. S. 295.
U. Mine Wkrs. v. Coronado Co., 259 U. S. 344, 393.

VI.

The Chancellor erred in ordering, adjudging and decreeing that the defendant should pay the Court costs. See authorities cited in the Assignment of Error No. I, above.

The Issues.

I.

The first three Assignments of Error raise the question:

Do the Tennessee courts have jurisdiction of a case wherein the conduct of which complaint is made arguably should be before the National Labor Relations Board?

II.

The fourth Assignment of Error raises the question:

Does the conduct of which complaint is made violate state laws, or is the conduct protected by the 14th Amendment to the Constitution of the United States?

III.

The fifth Assignment of Error raises the question:

Is an international union bound by the acts of the agents and representatives of a local union; and is a local union bound by the acts of pickets which were placed by another labor organization?

IV.

The sixth Assignment of Error raises the question:

Should the court costs be taxed against the defendants in the event issues I and II are found in favor of the appellants?